Sahuaro Petroleum and Asphalt Company *and* Brandon Chancellor, Petitioner and Transport Local Delivery and Sales Drivers, Warehousemen and Helpers, Mining and Motion Picture Production, State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters, AFL–CIO.[1] Case 28–RD–621

February 28, 1992

SUPPLEMENTAL DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in, and objections to, an election and the hearing officer's report recommending disposition of them. A decertification election was held on November 30, 1989, pursuant to a Stipulated Election Agreement. The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's findings and recommendations, overrule the Union's objection, and certify the results of the election.[2]

There were no exceptions to the hearing officer's recommendation that all challenges to ballots be overruled. On July 5, 1990, the Board remanded the proceeding to the Regional Director to open and count the challenged ballots and issue a revised tally as a matter preliminary to the final disposition of the case. The revised tally of ballots showed 7 votes in favor of the Union and 8 votes against. The remand did not address the Union's timely objection alleging that employees Robinson, Garrison, and Dougherty were unable to vote because the Employer's driving assignments prevented their return during the voting period.[3]

Because the Union lost the election by one vote, we must decide whether the Employer was responsible for disenfranchising at least two of the disputed voters.

The hearing officer found that the Union had not established that the Employer's conduct in any way prevented employees Robinson, Garrison, and Dougherty from voting and recommended overruling the objection. For the reasons which follow, we adopt the hearing officer's recommendation with respect to Robinson and Dougherty. Because Garrison's vote alone is insufficient to affect the results, we overrule the objection and certify the results of the election without addressing his situation.

I. FACTS

A. *Robinson*

The polls were open from 2 to 3:30 p.m. at the Employer's facility at Phoenix, Arizona. Robinson's assignment on the day of the election involved driving on a roundtrip to Tucson, Arizona. There is a discrepancy in the record concerning the time of Robinson's return. The Union's election observer, Bob Charney, testified that 10 minutes after the polls closed he observed Robinson ask the Board agent to permit him to vote. According to Charney, the Board agent told Robinson it was too late, as the polls were closed. Robinson did not testify. His timecard shows that he arrived at the yard at 3:30 p.m.; the Employer's analysis of Robinson's clock charts show that Robinson may have arrived at the yard at 3:12 p.m. The Employer's vice president of operations, Al Anderson, testified without contradiction that Robinson should have been able to complete his assignment and return to the Employer's facility in time to vote. The Union did not offer evidence to explain the time discrepancy or show why Robinson was late.

B. *Dougherty*

Employee Dougherty's timecard reflects that he signed in at 3 a.m. on the day of the election and was dispatched to Yuma, Arizona. His timecard also shows that on his return trip he observed an accident and stopped for 45 minutes to assist. He arrived back at the truck yard at 4:15 p.m., 45 minutes after the polls closed. Vice President Anderson testified that the Employer ''encourages'' its employees to assist at accidents. Dougherty did not testify.

II. ANALYSIS

Where the conduct of a party to the election causes an employee to miss the opportunity to vote the Board will find that to be objectionable if the employee's vote is determinative and the employee was disenfranchised through no ''fault'' of his own. *Versail Mfg.*, 212 NLRB 592, 593 (1974). When an employee

[1] The name of the Union has been changed to reflect the new official name of the International Union.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation that the objection be overruled to the extent it relates to employee Steve Wostal.

[3] The Union's objection was as follows: ''(4) eligible employees were not given the opportunity to vote in this election, a fact that could be determinative of the outcome of this election . . . Even though the company and its representative made direct assurances that they would schedule all eligible employees in such a manner as to be available to vote, at least (4) eligible drivers were not able to vote because of their work schedule, two (2) of these employees being Ronnie Robinson and Bob Garrison. Mr. Robinson showed up to vote at the completion of his work assignment, but shortly after the polls had closed. It is our understanding that Mr. Garrison was on a work assignment throughout the voting period and thus unable to vote.'' The Union's exceptions to the hearing officer's recommendations were confined to the asserted disenfranchisement of three eligible voters—Garrison, Dougherty, and Robinson.

is prevented from voting by reason of sickness or some other unplanned occurrence beyond the control of a party or the Board the inability to vote is not a basis for setting aside the election. Id. The burden is on the objecting party, in this case, the Union, to come forward with evidence in support of its objection. *Campbell Products Dept*., 260 NLRB 1247 (1982).

At issue in this case is whether the conditions that caused the disenfranchisement of these employees were foreseeable and within the Employer's control.

In finding that the Union had not shown that Robinson's situation was attributable to the Employer, the hearing officer relied on undisputed testimony that Robinson had sufficient time to return to vote in the election. The evidence is also undisputed that Robinson did not appear to vote until after the polls had closed. The Union failed to adduce any evidence to explain why he was late. Since there is no evidence that Robinson's lateness was attributable to the Employer's conduct, we cannot find that the Employer was responsible for Robinson's failure to vote. Accordingly, we conclude that Robinson's disenfranchisement was not objectionable.

We also find that the Union has not met its burden of showing that Dougherty's inability to vote was, in fact, attributable to the Employer. Employer Vice President Anderson's uncontroverted testimony was that at the ''outside'' it takes 3 hours 15 minutes to go from Yuma to the Employer's facility at Phoenix.[4] It took Dougherty 5 hours, from 11:15 a.m., when he left Yuma, until 4:15 p.m., when he arrived at the Employer's Phoenix facility. Even allowing for the 45 minutes it took Dougherty to stop for the accident,[5] Dougherty still took 1 hour more to get back to the Employer's Phoenix facility than the record establishes was required. If Dougherty had arrived at the facility in the 4 hours (including the time at the accident) that it should have taken him at the outside, he would have been there by 3:15 p.m., in time to vote. Dougherty did not take the stand, and the Union offered no evidence to explain this discrepancy.[6] Thus, even if Dougherty's stopping at the accident was attributable to the Employer—which has not been established on this record—and those 45 minutes were to be subtracted from Dougherty's trip time, his inability to vote would not be objectionable without some explanation from the Union why it took him an extra hour to return. That explanation was not forthcoming.

We find the evidence insufficient to show that either Robinson or Dougherty was prevented by the Employer from voting in the election, and thus their inability to vote was not objectionable. Because Garrison's vote alone could not have affected the results, we overrule the Union's objection and certify the results.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Transport Local Delivery and Sales Drivers, Warehousemen and Helpers, Mining and Motion Picture Production, State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters, AFL–CIO, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I find that the conditions that caused the disenfranchisement of two eligible voters in the instant case were foreseeable and within the Employer's control. I, therefore, would reverse the hearing officer's recommendation that the Union's objection be overruled to the extent it pertains to employees Garrison and Dougherty,[1] and I would set aside the election and direct a second election.

The facts regarding the disenfranchisement of employee Garrison are as follows. Garrison's assignment on the day of the election involved delivering asphalt from the Employer's Phoenix, Arizona facility to a customer in Lake Havasau City, Arizona. Before leaving the yard on the morning of November 30, 1989, Garrison called the Employer's dispatcher to inform him that the assigned truck had a faulty dumping

[4] Dougherty had made the trip from Phoenix to Yuma in 2 hours 45 minutes that same morning.

[5] The Employer's policy is only to ''encourage'' its employees to stop at an accident. On its face the policy could just as easily be interpreted to excuse an employee from stopping if he had a good reason for not doing so or if his assistance was not needed (if, for example, there were police and emergency vehicles already on the scene). Because we do not know the circumstances of this accident, we are left to speculate not only about the compulsory nature of the Employer's policy but also about whether the facts of this particular accident made Dougherty's assistance mandatory under the Employer's policy. As the objecting party, the Union failed in its burden to come forward with clarifying evidence.

[6] Contrary to our dissenting colleague, Vice President Anderson's general testimony, not specifically related to the Dougherty trip, about factors, such as weather or traffic conditions, which *could* cause delays in the normal course of business cannot serve to explain what factors actually caused Dougherty to lose the additional hour. The Board does not speculate about such matters. Thus, our dissenting colleague's reliance on *Glenn McClendon Trucking*, 255 NLRB 1304 (1981); *Cal Gas Redding, Inc*., 241 NLRB 290 (1979); and *Yerges Van Liners*, 162 NLRB 1259 (1967), is misplaced. In each of those cases, unlike the instant case, the objecting party established beyond mere speculation that eligible voters were prevented from voting as a result of assignments performed in the normal course of their duties for their employers.

[1] As noted by my colleagues, because the Union lost the election by one vote, it must be determined whether the Employer was responsible for disenfranchising at least two of the three disputed voters. In adopting the hearing officer's recommendation to overrule the objection and certify the results of the election, my colleagues rely solely on his findings regarding employees Robinson and Dougherty. In disagreeing with the hearing officer's recommendation, I find that employees Garrison and Dougherty were prevented from voting by the work assignments made by the Employer.

mechanism. According to Garrison, the dispatcher said, ''Just do it anyway you can to get it off.'' Garrison's timecard reflects that he clocked in at 2:06 a.m. and arrived back in the yard at 4:30 p.m. Garrison's timecard also reflects that, inter alia, it took him 5 hours to unload at the jobsite. According to Garrison's testimony, under normal conditions it would have taken him only 1 to 2 hours to unload at the jobsite. However, due to the truck's faulty dumping mechanism, he was unable to unload the truck in the usual manner—from the bottom—and instead had to unload the asphalt over the top of the truck. This kept him on the jobsite for at least 3 additional hours and caused him to arrive back at the yard much later than anticipated. It is undisputed that, while under normal circumstances Garrison would have returned to the plant in sufficient time to vote in the election, he arrived after the polls had closed.

Regarding the disenfranchisement of employee Dougherty, on the day of the election, he was assigned to make a delivery to a customer in Yuma, Arizona. On the return trip, he witnessed an accident and, in accordance with the Employer's policy encouraging employees to do so, he stopped and assisted at the accident. Dougherty arrived back at the Employer's facility after the polls had closed.

In certifying the election results on the basis that the disenfranchisement of two of the employees was not shown to be attributable to the Employer's conduct, my colleagues rely on *Versail Mfg*., 212 NLRB 592, 593 (1974). I find that case distinguishable from the instant case because here two employees were unable to vote in the election because they were away from the polling place in the normal course of their duties for the employer.[2]

In *Versail Mfg*., the Board declined to set the election aside because the employee was prevented from voting by personal activities away from the polling place which were outside the normal scope of his employment. In doing so, the Board distinguished the facts in that case from those in *Yerges Van Liners*, supra, which is apposite here, stating:

> In our opinion, the fact that required the *Yerges* election to be set aside was that the employee was caused to miss the election by the Employer, a party to the proceeding. The same protective policy would be applicable if the petitioning union, or the Board itself, prevented an eligible employee from voting. It would be inapplicable, of course, if the crucial employee was prevented from voting by reason of sickness or some other unplanned occurrence beyond the control of the parties, the Board, or the employee.[3]

Clearly, in *Versail*, the Board declined to set the election aside on the basis that the employee was prevented from voting due to his own actions rather than because he was away in the normal course of his duties for his employer.

In the instant case, the evidence indicates that employees Garrison and Dougherty were prevented from voting by the Employer. Regarding employee Garrison, the evidence shows that the Employer's knowing assignment of Garrison to a faulty truck caused his delay. Regarding employee Dougherty, the evidence shows that he missed the election because he witnessed an accident and, pursuant to the Employer's policy encouraging employees to do so, he stopped to assist. That stopping for accidents constitutes part of the normal duties of the Employer's drivers is demonstrated by the fact that, according to the Employer's vice president, the Employer has a policy encouraging such stops.[4]

Contrary to my colleagues, I find that the Union has met its burden in the instant case of establishing that Dougherty's inability to vote was attributable to the Employer. In this regard, I find that, since the Union initially established that Dougherty was assigned the run in the normal course of duties and stopped for an accident pursuant to the Employer's policy encouraging its employees to do so, the burden then shifted to the Employer to conclusively establish that Dougherty was prevented from voting by personal activities.[5] This the Employer failed to do.

[2] See *Glenn McClendon Trucking*, 255 NLRB 1304 (1981); *Cal Gas Redding*., 241 NLRB 290 (1979); *Yerges Van Liners*, 162 NLRB 1259 (1967).

[3] 212 NLRB at 593.

[4] My colleagues essentially conclude that the Union has failed to establish that Dougherty's stopping at the accident was mandatory. I find, however, that in light of the record evidence establishing that it is the Employer's policy to encourage its employees to stop at an accident, it was the Employer's burden to establish that Dougherty's stopping was not in accordance with its policy.

[5] In concluding that Dougherty was not disenfranchised by the Employer, my colleagues rely heavily on the testimony of the Employer's vice president that at the ''outside'' the run from Yuma to Phoenix takes 3 hours and 15 minutes, and on their finding that, even allowing for the 45 minutes Dougherty stopped for the accident, it still took 1 more hour (the missing hour) than 3 hours and 15 minutes for Dougherty to complete the run. The Employer's vice president in further testimony, however, also acknowledged that in the normal course of a run various other factors such as rain, highway construction, and slow traffic may cause additional delays.

My colleagues conclude that it is speculative to rely on such factors to explain the missing hour. But, in light of all the circumstances here, including this testimony and the absence of any affirmative evidence indicating that the delay, in fact, was attributable to any personal activities by Dougherty, my colleague's decision rests on their own unwarranted speculation that Dougherty must have engaged in such activities.

In sum, I find that employees Garrison and Dougherty were prevented from voting because they were absent from the polling place in the course of their normal duties for the Employer, and that, therefore, the election should be set aside. Accordingly, I dissent from my colleagues' certifying the results of the election.